No. 46237-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

NATASHIA R. MEYER, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Toni A. Sheldon

No. 13-1-00268-0

BRIEF OF RESPONDENT

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A. STATE'S COUNTER-STATEMENT OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Meyer contends that her trial counsel was ineffective for not requesting a jury instruction on the defense of voluntary intoxication due to her use of methamphetamine or another drug. The State counters that the evidence was insufficient to support an assertion that methamphetamine or another drug affected her ability to premediate and intend the killing of the victim in this case, that Meyer has failed to show that the outcome of the trial would have been different had counsel pursued the defense of voluntary intoxication, and that counsel's decision to forego the forego the voluntary intoxication defense in favor of the asserted justifiable homicide defense was a legitimate trial strategy.

2. The State concedes that neither alcohol nor bars, taverns, or places that serve liquor contributed in any way to Meyer's crime of conviction and that it is, therefore, error to require as a condition of community custody that she not frequent places where the primary business is the sale of alcohol.

B. FACTS AND STATEMENT OF THE CASE

The State accepts Meyer's statement of facts but includes references to additional facts, below, as needed to develop the State's arguments. RAP 10.3(b).

As early as July of 2013, Meyer's trial counsel indicated in an omnibus application that "[t]he general nature of the defendant's defense is... diminished capacity... justification[.]" CP 127. In a second omnibus

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application filed in November of 2013 Meyer again indicated the defenses of "diminished capacity... justification[.]" CP 118; RP 24. At the omnibus hearing, Meyer's trial counsel informed the court that Meyer would be pursuing "a diminished capacity defense" (but at that time a doctor or mental health professional had not yet interviewed her in preparation for the defense). RP 25-26.

The record shows that four months later, on March 10, 2014, the prosecutor filed motions in limine (which, from the context, show that Meyer had then been interviewed and examined by an expert in preparation for a diminished capacity defense). CP 108-111. The State's Motion in Limine No. 13 stated as follows:

> The Plaintiff moves the Court to exclude the testimony of Dr. Kenneth Muscatel, Ph.D., Clinical, Forensic and Neuropsychology. Dr. Muscatel is named as a defense witness and expert pertaining to the Defendant's indicated defense of Diminished Capacity. Dr. Muscatel submitted a report dated February 20, 2014, which was transmitted to the Mason County Prosecutor's Office on February 21, 2014. In his report, Dr. Muscatel discusses at length the unfortunate circumstances of the Defendant's life and her belief that she had been sexually assaulted sometime prior to the shooting.
>
> However, Dr. Muscatel's ultimate conclusion is that ***"There is not much question Ms. Meyer engaged in intentional behavior when she shot Mr. Blevins"*** and that ***"Her actions included thinking ahead of her actions...."***

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> He also states, ***"It did not appear Ms. Meyer was psychotic at the time of our interview, and I saw no compelling evidence she was psychotic at the time of the incident, or otherwise out of touch with reality."***
>
> He further opines, ***"There is no evidence [the defendant] did not understand her conduct was against the law, but she said she felt justified in shooting him because she wanted him to know what it was to suffer, like she suffered, and to be held responsible for once for a very bad thing he did."***
>
> Dr. Muscatel's testimony is not relevant, in that it has no tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401. Furthermore, any probative value that it may have is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. ER 403.

CP 110-111 (italics, bold print, and brackets are retained from the prosecutor's pleading). In response to the prosecutor's Motion in Limine No. 13, Meyer answered as follows:

> The State in its Motions in Limine No. 13 moves to exclude the testimony of Dr. Kenneth Muscatel who interviewed Natashia after the shooting. This testimony is relevant and Natashia Meyer requests this witness be allowed to testify. This testimony supports Defendant's theory that the shooting was justified because Sam Blevins the victim anally gang raped the Defendant prior to the shooting. Natashia Meyer has a constitutional right to call witnesses in her defense and the testimony of this witness in [sic] fundamental to proving her defense.

CP 106.

A hearing on the motions in limine occurred on March 13, 2014. RP 45. During discussion of Motion in Limine No. 13, the prosecutor stated:

> And as I recall - I don't want to just speak from memory if I have it here with a stamp on it. It was quite awhile ago that he had first been listed as a witness -- October 9th of 2013 is when I received the first disclosure of defendant's possible primary witnesses. On February 21st we received it by fax. At our Monday pretrial I had indicated that we may need to get a evaluation of our own, depending on where we needed to go, but that that may not be necessary given what I was reading in Dr. Muscatel's report. And in fact, I discussed that with counsel very briefly and it was my understanding from him that, indeed, although he was expecting or hoping for something different from the forensic psychologist, that with respect to insanity or diminished capacity, the doctor's opinion was in fact that she was not - she did not suffer from any insanity; she did not suffer from a diminished capacity, and that that wouldn't be an issue with needing to have a State's evaluation.
>
> It certainly was my impression, my recollection that the indication was that they wouldn't be calling Dr. Muscatel, but I may have misunderstood or mis-drawn an inference that I shouldn't have. It was when I received yet another disclosure of defense witnesses that included Dr. Muscatel again that I decided to include this in the State's motions in limine because the report is filled, certainly as they always are, whether it's Western State Hospital or a private forensic psychologist, with a full history and background of Ms. Meyer, in this case, including many unfortunate circumstances of her life. It includes conclusions drawn by the doctor in terms of what the evidence proves and what he believes in terms of - or, should I say who he believes - in this case, Ms. Meyer.
>
> Ultimately, his conclusion is and his opinion is, as contained in his report, as I've outlined in the State's motion also, in his words, there is not much question Ms. Meyer engaged in intentional behavior when she shot Mr. Blevins, that her actions

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> included thinking ahead of her actions, that it did not appear she was psychotic at the time of our interview, and I saw no compelling evidence she was psychotic at the time of the incident or otherwise out of touch with reality. That there is no evidence that the defendant did not understand her conduct was against the law, but she felt justified in shooting him because she wanted him to know what it was to suffer like she suffered and to be held for responsible for once for a very bad thing he did.
>
> It isn't relevant at all whether the defendant felt she was justified in shooting Mr. Blevins for something that she believed he had - he was responsible for. And it isn't - the doctor isn't testifying that there is any diminished capacity, so there is no defense that his testimony would be relevant to. His testimony, as I see it, can only be intended to engender sympathy for the defendant, which is an improper purpose to be presenting the testimony of an expert witness.

RP 60-62. Meyer's trial counsel then responded, in relevant part, as follows:

> Mr. Dorcy is correct in his recitation of Dr. Muscatel's findings. He originally did the interview and evaluation toward determining whether or not there was diminished capacity or insanity at the time of the incident, and he determined there was not. However, he does go into an extended examination of Ms. Meyer's history, and I think that is relevant.

RP 62.

Meyer's trial counsel confirmed with the court that the defense she was now pursuing was the defense of justifiable homicide rather than diminished capacity. RP 62-63, 66-68. The trial court partially granted

the State's motion, but the court reserved the ruling on "whether Dr. Muscatel has anything that would be relevant in using under the theory of justifiable homicide...." RP 69

In this case, the State charged Meyer with murder in the first degree, alleging a violation of RCW 9A.32.030(1)(a). CP 139-40. Proof of the offense required proof that Meyer acted with premeditated intent to cause the death of Sam Blevin. *Id.*; RCW 9A.32.030(1)(a).

At trial, there was evidence that Meyer had taken drugs the day before the killing. Ex. 71 at 5-6, 19; RP 57, 67, 169, 172-74, 192, 395, 453-54, 468, 493-94, 498, 501-07, 513, 522-23, 528, 533. Meyer told a detective that when she killed Blevins she was "whacked out and still messed up on drugs like really bad." RP 346. At trial, Meyer testified to the jury that when she killed Blevins she "was really, really whacked out." RP 519. When police interviewed her soon after the killing, she appeared to be under the influence. RP 356-58. But, although Meyer appeared to have been under the influence of meth, she also appeared to be functional and not incapacitated by it. RP 172-74, 325, 358.

Still more, Meyer admitted that she knew right from wrong when she killed Blevins and that she knew before she killed him that she would

go to jail for killing him. RP 345, 385, 390. She admitted that she premeditated the killing. RP 383, 406-07, 515-18. Meyer killed Blevins for "justice" because she believed that he had raped her. RP 530-31.

A medical doctor who examined Meyer soon after the killing observed that she exhibited signs that she was under the influence of, or affected by, methamphetamine. RP 398, 403-04, 408-11. When questioned about the effect of methamphetamine, the doctor testified that it "[t]ypically... causes a lot of anger, aggression, [and] paranoia, at its worst." RP 414. She elaborated that workers in her profession "happen to see a lot of people that think everybody is trying to kill them, including us." RP 414. Regarding the signs and symptoms exhibited by Meyer specifically, however, the doctor testified that she "found it hard to differentiate what was from drugs, what was from the event, the alleged event." RP 415. The doctor explained that Meyer exhibited anger but that she wasn't exhibiting anger at the medical staff, "which was unusual for somebody who was really, really high on meth." RP 416. Instead, Meyer merely "seemed jittery like it was – she was somebody that uses meth, but isn't acutely really intoxicated from it right then." RP 417.

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During trial, Meyer's trial counsel did not pursue a voluntary or involuntary intoxication defense but instead elicited testimony to support an assertion that Meyer was afraid of Blevins because she knew he had raped 14 year old girls and because he showed up unexpectedly at her home after having raped her the night before. RP 366-67. Meyer testified that she was afraid when Blevins showed up at her home, and that she was scared when she shot him. RP 504, 508.

After the close of the presentation of evidence, rather than argue intoxication as a defense, Meyer successfully obtained a justifiable homicide instruction. RP 556-57, 594; CP 14 (Jury Instruction No. 14). Counsel also obtained jury instructions for the lesser-included offense of murder in the second degree. RP 545; CP 50-52. In closing argument, Meyer's trial counsel argued that when Blevins showed up unexpectedly at Meyer's home he told her to get in his car and that she tried to "shoot him instead to defend herself...." RP 619. Counsel argued that Meyer wasn't really trying to kill Blevins but that she was instead only trying to shoot him to defend herself and that it was an "accidentally fired shot" that "actually killed Sam Blevins." RP 620. Counsel argued that despite the accidental nature of the killing, Meyer "[had] a right to defend herself."

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RP 620. Trial counsel argued the defense of justifiable homicide. RP 619-27.

After receiving the evidence and hearing the arguments of counsel, the jury returned a verdict of guilty for the charge of murder in the first degree and returned a special verdict finding that Meyer was armed with a firearm at the time of the commission of the crime. RP 647-48; CP 31, 33.

C. ARGUMENT

1. Meyer contends that her trial counsel was ineffective for not requesting a jury instruction on the defense of voluntary intoxication due to her use of methamphetamine or another drug. The State counters that the evidence was insufficient to support an assertion that methamphetamine or another drug affected her ability to premediate and intend the killing of the victim in this case, that Meyer has failed to show that the outcome of the trial would have been different had counsel pursued the defense of voluntary intoxication, and that counsel's decision to forego the forego the voluntary intoxication defense in favor of the asserted justifiable homicide defense was a legitimate trial strategy.

Meyer asserts that her trial counsel was ineffective for not pursuing a voluntary intoxication defense. Br. of Appellant at 8.

Ineffective assistance of counsel is a two-pronged test that requires

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the reviewing court to consider whether trial counsel's performance was deficient and, if so, whether counsel's errors were so serious as to deprive the defendant of a fair trial for which the result is unreliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32-34, 246 P.3d 1260 (2011). To prevail on her claim of ineffective assistance of counsel, Meyer must demonstrate prejudice; to demonstrate prejudice, Meyer must show both that her counsel's performance was deficient and that, but for the deficient performance, there is a reasonable probability that the outcome of the trial would have been different. *Strickland*, 466 U.S. at 697; *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007). If one of the two prongs is absent, the reviewing court need not inquire further. *Id.*

Legitimate trial tactics are not deficient performance. *Grier*, 171 Wn.2d at 33. Effective representation at trial is presumed on review, and an appellant asserting that trial counsel was ineffective is required to show the absence of legitimate strategic or tactical reasons for the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995), *as amended* (Sept. 13, 1995). "Deficient performance is not shown by

matters that go to trial strategy or tactics." *State v. Hendrickson,* 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

Generally, to be entitled to a voluntary intoxication jury instruction a defendant must show that intoxication affected his or her ability to form a requisite mental state. *State v. Everybodytalksabout,* 145 Wn.2d 456, 479, 39 P.3d 294 (2004). Relevant to the crime of conviction in the instant case, murder in the first degree, to obtain a voluntary intoxication jury instruction Meyer would have been required to show that intoxication affected her ability to premeditate and cause the death of Sam Blevins. *Id.*; RCW 9A.32.030(1)(a); CP 49 (Jury Instruction No. 10).

But evidence of impairment, alone, is insufficient to establish the defense of voluntary intoxication. *Everybodytalksabout* at 479. Instead, there must be some credible evidence that the defendant's impairment affected her ability to form the necessary mental state to commit the charged crime. *State v. Tilton,* 149 Wn.2d 775, 784, 72 P.3d 735 (2003). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the declared premise. *State v. Halstien,* 122 Wn.2d 109, 129, 857 P.2d 270 (1993).

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Thus, on the record of the instant case, Meyer cannot show that her counsel was ineffective for failing to request a voluntary intoxication instruction. The evidence shows that Meyer was a longtime user of illicit drugs, including methamphetamine, and that she had used drugs and was affected by them when she killed Sam Blevins, but the evidence does not show that Meyer's use of methamphetamine or another drug impaired her mind to the point that it negated her intent to kill Sam Blevins. Ex. 71 at 5-6, 19; RP 57, 67, 169, 172-74, 192, 325, 346, 356-58, 395, 453-54, 468, 493-94, 498, 501-07, 513, 519, 522-23, 528, 533. The evidence shows only that Meyer was fidgety and agitated, that she saw trails, and that she fell asleep from crashing, and the evidence thus shows that she was affected by methamphetamine and possibly another drug, but the evidence does not show that she was effected by a drug to the extent that she was did not have the ability to premeditate or intend the killing of Sam Blevins. *Id.*

To the contrary, her own expert (who she declined to call as a witness) opined that Meyer knew that she was breaking the law when she killed Blevins, that she was not psychotic at the time of the killing, and that she planned the killing in advance and intentionally killed Blevins.

CP 110-111; RP 60-62. The evidence showed that Meyer knew right from wrong when she killed Blevins and that she knew she would go to jail for killing him, but she chose to do so despite the consequences. RP 345, 383, 385, 390, 406-07, 515-518, 530-31.

Arguably, even if the evidence was weak that drug intoxication effected Meyer's ability to premeditate or intend the murder of Blevins, Meyer may nevertheless have been entitled to a voluntary intoxication instruction had counsel asked for one. *See, e.g., State v. Walters*, 162 Wn. App. 74, 255 P.3d 835 (2011). But to show deficient performance, a defendant must show the absence of any conceivable legitimate trial tactic explaining counsel's performance. *State v. Grier,* 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

On the facts of the instant case, it is conceivable that trial counsel legitimately pursued the justifiable homicide defense over a voluntary intoxication defense because, even if the court would have given a voluntary intoxication instruction had one been requested, it is unlikely that the defense would have succeeded in front of the jury. Meyer, herself, admitted that she planned to shoot Blevins and that she killed him for "justice." RP 406-07, 515-18, 530. Meyer has not presented anything to

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show how the use of methamphetamine or another drug affected her ability to premediate or intend the killing of Sam Blevins. Absent some showing that voluntary intoxication was a viable defense, there is no prejudice and no basis for an ineffective assistance claim. *State v. Tilton,* 149 Wn.2d 775, 784, 72 P.3d 735 (2003). Given the weight of the evidence that Meyer premeditated the killing, she has failed to show that a voluntary intoxication instruction would have changed the outcome of the trial. *State v. Brett,* 126 Wn.2d 136, 200, 892 P.2d 29 (1995), *cert. denied,* 516 U.S. 1121 (1996).

Finally, the State contends that Meyer has not shown that her trial attorney's decision was not a legitimate trial strategy. Rather than pursue the voluntary intoxication defense, trial counsel pursued a justifiable homicide defense. The State contends that given the weight and volume of the evidence, neither of the two defenses was particularly viable. But, arguably, even a weak defense is better than no defense. Here, Meyer has not shown, and cannot show, that the outcome of the trial would have been different had her attorney requested a voluntary intoxication instruction and argued the defense to the jury. Without this showing, Meyer's claim

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of ineffective assistance of counsel must fail. *Strickland*, 466 U.S. at 697; *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

Here, Meyer could have argued both defenses (voluntary intoxication and justifiable homicide), but the mere possibility or fact that she could have obtained instructions on both defenses does not mean that it would have been wise or would have been sound trial strategy to do so. *See, e.g., State v. Mannering*, 150 Wn.2d 277, 286–87, 75 P.3d 961 (2003). To retain credibility for her defense of justifiable homicide, Meyer was wise not to present the defense of voluntary intoxication where, even though there was evidence that she was under the influence of drugs, there was no evidence that the drugs affected her ability to premediate and intend the killing of Sam Blevins, and where her own testimony and the opinion of her non-testifying expert discredited the defense. Thus, forgoing assertion of the defense of voluntary intoxication was a legitimate trial tactic explaining counsel's performance, and Meyer has, therefore, failed to establish that her trial counsel was ineffective. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

2. The State concedes that neither alcohol nor bars, taverns, or places that serve liquor contributed in any way to Meyer's

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> crime of conviction and that it is, therefore, error to require as a condition of community custody that she not frequent places where the primary business is the sale of alcohol.

A defendant may challenge illegal or erroneous sentences for the first time on appeal. *State v. Bahl,* 164 Wn.2d 739, 744, 193 P.3d 678 (2008); *State v. Jones,* 118 Wn.App. 199, 204, 76 P.3d 258 (2003). A trial court's authority to impose community custody conditions is reviewed de novo. *State v. Armendariz,* 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

A sentencing court has discretionary authority to impose crime-related prohibitions. RCW 9.94A.703(3)(f); *State v. Land,* 172 Wn.App. 593, 605, 295 P.3d 782 (2013), *review denied,* 177 Wn.2d 1016 (2013). A "crime-related prohibition" is one that involves "conduct that directly relates to the circumstance of the crime for which the offender has been convicted." RCW 9.94A.030(10).

A trial court has authority to prohibit alcohol consumption as a community custody condition, regardless of the underlying offense's nature. RCW 9.94A.703(3)(e). But the trial court lacks authority to prohibit the purchase and possession of alcohol unless alcohol is "reasonably related to the circumstances of [the defendant's] alleged offenses." *State v. McKee,* 141 Wn. App. 22, 34, 167 P.3d 575 (2007).

In the instant case, entering places whose primary business is the sale of liquor does not reasonably relate to the circumstances of Meyer's crime of premeditated murder in the first degree. Thus, the State concedes that it was error to restrict Meyer from entering places whose primary business is the sale of liquor. *McKee,* 141 Wn.App. at 34.

D. CONCLUSION

For the reasons argued above, the State asks the court to deny Meyer's claim of ineffective assistance of counsel. But the State concedes that because alcohol did not contribute to Meyer's crime, the trial court should strike the community custody condition that prohibits Meyer from going to bars, taverns or places where alcohol is sold or served.

DATED: February 24, 2015.

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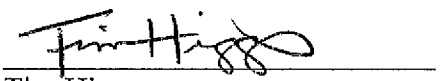

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